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Merola Sales Company, Inc.*

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Merola Sales Company, Inc.,

No. CV-18-00248-PHX-SPL

Plaintiff/Counterdefendant.

VS.

Tabarka Studio, Inc.,

Defendant/Counterclaimant:

**PLAINTIFF/COUNTER-
DEFENDANT MEROLA SALES
COMPANY'S MOTION TO
PARTIALLY DISMISS
DEFENDANT/COUNTER-
CLAIMANT TABARKA STUDIO'S
COUNTERCLAIM**

(Oral Argument Requested)

Tabarka Studio, Inc.,

Third Party Plaintiff,

VS.

Home Depot Product Authority, LLC, et al.,

Third Party Defendants.

Pursuant to Rules 12(b)(1), 12(b)(6), 17(a), and 17(b) of the Federal Rules of Civil Procedure, Plaintiff /Counterdefendant Merola Sales Company, Inc. (“Merola”), requests that the Court partially dismiss Tabarka Studio, Inc.’s (“Tabarka”) Amended Counterclaim because: 1) Tabarka lacks standing to seek remedies for any alleged infringement of certain works; and, 2) Tabarka has failed to state cognizable claims for certain works.

This Motion is supported by the attached Memorandum of Points and Authorities and contemporaneously filed Certificate of Counsel.

MEMORANDUM OF POINTS AND AUTHORITIES

I. **INTRODUCTION.**

As articulated in the Complaint, this case arises from Tabarka’s assertion of copyright infringement regarding four purported works that it identifies as:

1. Paris Metro 1;
2. Paris Metro 11;
3. Casablanca 2; and,
4. Touareg 6.

(collectively, the “Works”).

The Amended Counterclaim alleges that Casablanca 2 was “created” in 2007 and that Paris Metro 1 and Paris Metro 11 were “created” in 2008. (Amended Counterclaim at ¶ 17). Tabarka admits that registration of the Works in the United States Copyright Office was not sought until August 15, 2017. (Amended Counterclaim at ¶¶ 29-31). Tabarka further concedes that the registration for Casablanca 2 was rejected by the Copyright Office on March 22, 2018 (Amended Counterclaim at ¶ 32), but does not allege the basis for the rejection and does not allege any facts as to why the Copyright Office’s rejection was improper.

1 Tabarka asserts that the author of the Works was non-party Meir Zenati (“Mr.
 2 Zenati”), and that “Mr. Zenati transferred his ownership interest in Paris Metro 1, Casablanca
 3 2, and Paris Metro 11 to Tabarka by oral agreement.” (Amended Counterclaim at ¶¶ 8, 17-18).
 4 These allegations, however, are in clear conflict with the authorship information registered
 5 with the Copyright Office in August 2017 and relied upon by Tabarka. (*See* Information from
 6 the Copyright Office’s Online Public Database, attached as Exhibits A1-A3). According to
 7 Tabarka’s filings with the Copyright Office, the “author” of Paris Metro 1 and Paris Metro 11
 8 purports to be non-party “Darna, Inc.”

10 As a matter of historic fact, Tabarka did not exist as a corporate entity until 2009. (*See*
 11 Arizona Corporation Commission Records, attached as Exhibit B). Darna, Inc. ceased existing
 12 as an entity in late-2006. (*See* California Secretary of State Certificate, attached as Exhibit C).¹
 13 Darna, Inc. was suspended by the California Secretary of State on October 19, 2006 and by the
 14 California Franchise Tax Board on December 1, 2006. (*See* Exhibit C). The Amended
 15 Counterclaim is thereby also notable for what it does not allege.

17 The Amended Counterclaim does not allege any merger between Darna, Inc. and
 18 Tabarka. The absence of such an allegation is not surprising given that Darna ceased to exist
 19 in 2006 and Tabarka was not incorporated until three years later. (*Cf.* Exhibits B and C). Nor
 20 does the Counterclaim allege the existence of any writing in which Darna, Inc. transferred its
 21 exclusive rights in the Paris Metro 1, Paris Metro 11, or Casablanca 2 works to Mr. Zenati,
 22 Tabarka, or anyone else.

24¹ As noted below, because Merola moves to dismiss under Rule 12(b)(1), the Court may
 25 consider extrinsic evidence without transforming the present motion into one for summary
 26 judgment. *See St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (a court reviewing
 its own jurisdiction may “rely on affidavits or any other evidence”); *see also Thornhill Publ’g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979).

1 **II. ARGUMENT**

2 **A. Legal Standards**

3 A motion to dismiss for lack of subject matter jurisdiction brought pursuant to Rule
 4 12(b)(1) may facially attack the existence of subject matter jurisdiction or may challenge the
 5 truth of the alleged facts that would confer subject matter jurisdiction on the court. *Renteria*
 6 *v. United States*, 452 F. Supp. 2d 910, 919 (D. Ariz. 2006) (citing *Thornhill Publ'g Co. v.*
 7 *Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979)). Courts are permitted to
 8 consider evidence to decide a factual attack on subject matter jurisdiction, and “no
 9 presumptive truthfulness attaches to the plaintiff’s allegations.” *Id.*; *see also St. Clair v. City*
 10 *of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (a Court reviewing its own jurisdiction may
 11 “rely on affidavits or any other evidence”). “The party asserting jurisdiction has the burden of
 12 proving all jurisdictional facts.” *Indus. Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th
 13 Cir. 1990). Where a claimant lacks standing, the court must dismiss the action for lack of
 14 subject matter jurisdiction pursuant to Rule 12(b)(1). *Ervine v. Desert View Reg. Med. Ctr.*
 15 *Holdings, LLC*, 753 F.3d 862, 868 (9th Cir. 2014).

18 When considering a Motion to Dismiss under Rule 12(b)(6), the Court must insist that
 19 the counterclaim contain factual allegations sufficient to “raise a right to relief above the
 20 speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While “a
 21 [counterclaim] need not contain detailed factual allegations [] it must plead ‘enough facts to
 22 state a claim to relief that is plausible on its face.’” *Clemens v. DaimlerChrysler Corp.*, 534
 23 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial
 24 plausibility when the plaintiff pleads factual content that allows the court to draw the
 25 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,

1 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Though “allegations of material
 2 fact are taken as true,” legal conclusions couched as factual allegations are not given a
 3 presumption of truthfulness, and “conclusory allegations of law and unwarranted inferences
 4 are not sufficient to defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir.
 5 1998).

6

7 **B. The Court Lacks Subject Matter Jurisdiction over Tabarka’s Claims of**
Infringement of the Paris Metro 1 and Paris Metro 11 Works.

8 **1. Lack of Standing Implicates the Court’s Subject Matter Jurisdiction.**

9 The United States Supreme Court has recognized that “[t]he federal courts are under an
 10 independent obligation to examine their own jurisdiction, and standing ‘is perhaps the most
 11 important of [the jurisdictional] doctrines.’” *FW/PBS v. Dallas*, 493 U.S. 215, 231 (1990)
 12 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)), overruled, in part, on other grounds, *City*
 13 *of Littlejohn v. Z.J. Gifts D-4, LLC.*, 541 U.S. 774 (2004). Moreover, “it is the burden of the
 14 ‘party who seeks the exercise of jurisdiction in his favor...clearly to allege facts
 15 demonstrating that he is a proper party to invoke judicial resolution of the dispute.’” *Id.*
 16 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *McNutt v. General Motors Acceptance*
 17 *Corp.*, 298 U.S. 178, 189 (1936)). Consistent with these foundational principles, the federal
 18 courts have consistently recognized that “[s]tanding is an essential component of the case or
 19 controversy requirement of Article III, section 2 of the United States Constitution.” *Carroll*
 20 *v. Nakatani*, 342 F.3d 934, 940 (9th Cir. 2003).

21 The threshold requirement to prevail on a claim of copyright infringement requires
 22 proof of ownership of a valid copyright. *See Feist Publications, Inc. v. Rural Telephone*
 23 *Service Co.*, 499 U.S. 340, 361 (1991); *see also Litchfield v. Spielberg*, 736 F.2d 1352, 1355
 24
 25
 26

1 (9th Cir. 1984) (“To prove copyright infringement, the plaintiff must show...ownership of the
 2 copyright...”); *National Center for Jewish Film, Inc. v. Goldman*, 943 F.Supp. 113 (D. Mass.
 3 1996) (party claiming ownership of a copyright by transfer bears the burden of proving a
 4 clear chain of title.).
 5

6 If a claimant does not own a copyright, the claimant does not have standing to sue for
 7 infringement of the exclusive rights belonging to the owner. *Silvers v. Sony Pictures Entm’t,*
 8 *Inc.*, 402 F.3d 881, 889 (9th Cir. 2005) (“only the owner of an exclusive right under
 9 the copyright is entitled to sue for infringement”). Moreover, the owner of the copyright must
 10 have owned the copyright at the time the alleged infringement took place. *See* 17 U.S.C. §
 11 501(b) (the “owner of an exclusive right under a copyright is entitled...to institute an action
 12 for any infringement of that particular right committed *while he or she is the owner of it.*”)
 13 (emphasis added).
 14

15 **2. Tabarka Lacks Standing to Sue for at Least the Paris Metro 1 and**
Paris Metro 11 Designs.

16 i. Three of the Works were created when Tabarka did not exist, and
nothing in the pleadings indicates a valid transfer to Tabarka.

18 “Copyright in a work...vests initially in the author or authors of the work.” 17 U.S.C. §
 19 201(a). Termination of a grant to the copyright contains “intricate formalities” that are
 20 particularly cumbersome and technical when the work was made for hire. *See Siegel v.*
 21 *Warner Bros. Ent., Inc.*, 658 F. Supp. 2d 1036, 1041 (C.D. Cal. 2009).

23 As demonstrated above, Darna, Inc. (“Darna”) ceased to exist as a corporate entity in
 24 December 2006. (*See Exhibit C*). A “suspended corporation cannot sell, transfer or exchange
 25 real property in California, and contracts entered into during the time of suspension are
 26 voidable...through legal action...Nor, during the period of suspension, may the corporation

1 prosecute or defend an action, seek a writ of mandate, appeal from an adverse judgment, or
 2 renew a judgment obtained before suspension.” *City of San Diego v. San Diegans for Open*
 3 *Government*, 207 Cal.Rptr.3d 703, 709 (Ct. App. 2016). Moreover, Tabarka did not exist as a
 4 corporate entity until April 21, 2009. (See Exhibit B).

5 According to the Amended Counterclaim, the Casablanca 2 work² was created in
 6 2007—a time during which neither Tabarka nor Darna existed. (Amended Counterclaim at ¶
 7 17). According to the Amended Counterclaim, the Paris Metro 1 and Paris Metro 11 works
 8 were created in 2008—again, a time period during which neither Darna nor Tabarka existed.
 9 *Id.* Despite its non-existence as a viable corporate entity, the Copyright Registrations on
 10 which Tabarka predicates its claims related to the Paris Metro 1 and Paris Metro 11 works
 11 vested “Darna, Inc.” with “Authorship on Application.” Importantly, Darna’s suspension at
 12 the time the works were created does not mean Mr. Zenati becomes the author by “luck” of
 13 having created a work whereby the authorship vested in a defunct corporation. *See, e.g.*,
 14 *Embassy Software Corp. v. eCopy, Inc.*, 592 F. Supp. 2d 225, 230 (D.N.H. 2009) (“The fact
 15 that a corporate act is ultra vires, however, does not mean that the act is necessarily void, or
 16 even voidable. According to the better reasoning, a corporation has the capacity, even if it
 17 does not have the authority, to do an ultra vires act”). Instead, the ultra-vires doctrine prevents
 18
 19
 20

21 ² Tabarka initially alleged that Mr. Zenati created the Works “in his role as artist” for non-party, Darna. (Original Counterclaim at ¶ 19). The Original Counterclaim also nakedly alleged that assets of Darna were “transferred to” Tabarka. (Original Counterclaim at ¶ 17). Tabarka subsequently dropped all mentions of Darna in its Amended Counterclaims. In the Amended Counterclaim, Tabarka fails to allege authorship of Casablanca 2 and fails to allege who it represented was the author of Casablanca 2 in its dealings with the Copyright Office. Tabarka also failed to produce anything in its MID Responses that gives Merola notice of who it contends is the author of Casablanca 2. Therefore, Merola can only guess that the Paris Metro Works’ authorship issues extend to Casablanca 2. In any event, Tabarka has not alleged sufficient facts to demonstrate that it has standing to sue for infringement of the Casablanca 2.

1 Mr. Zenati from benefiting from the fact that he failed to pay taxes and failed to operate his
2 corporations in good-standing.

Under California corporate law, Darna lacked the ability to author or own authorship of the subject works on application. Further, the application for the subject works was not made until August 2017—a date long-after which Darna ceased to have the corporate capacity to seek registration of the subject works. *City of San Diego*, 207 Cal.Rptr.3d at 709. Nor did Darna have the capacity to validly transfer its exclusive rights in the subject works to Tabarka. *Id.* Despite this, Tabarka listed itself as the “copyright claimant” on its registrations for Paris Metro 1 and Paris Metro 11, and told the Copyright Office that the transfer was “by written agreement.” (See Public Catalog Entry, Exhibits A1 and A2).

12 Despite this proclamation to the Copyright Office by Tabarka, no such written
13 agreement is now alleged to have existed at the time registration was sought (on August 15,
14 2017), and no such written agreement has been produced despite the parties exchange of
15 MIDP Responses on May 7, 2018. Instead, Tabarka’s Amended Counterclaim merely alleges
16 that “Mr. Zenati transferred his ownership interest in Paris Metro 1, Casablanca 2, and Paris
17 Metro 11 to Tabarka by oral agreement” and then later “memorialized” the agreement on May
18 1, 2018. (Amended Counterclaim at ¶¶ 17-19). The Amended Counterclaims are
19 categorically silent as to how any rights were transferred from Darna to Mr. Zenati, thereby
20 rendering the alleged transfers of rights from Mr. Zenati to Tabarka invalid and irrelevant.
21

ii. Rights were not validly transferred to Mr. Zenati or to Tabarka.

24 Where a plaintiff asserts standing based upon transfer of an exclusive right, the transfer
25 must comply with the writing requirements of § 204 (a) of the United States Copyright Act.
26 *See McCormick v. Amir Construction, Inc.*, 279 Fed. Appx. 470 (9th Cir. 2008).

Section 204 (a) of the United States Copyright Act provides, in pertinent part:

A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and *signed by the owner of the rights* conveyed or such owner's duly authorized agent.

See 17 U.S.C. § 204 (a) (emphasis added). The parties cannot waive the § 204 requirements, nor can parties avoid a failure to comply with the writing requirement. Rather, the writing requirement is absolute. *See, e.g., Asset Marketing Systems, Inc. v. Gagnon*, 542 F.3d 748, 754 (9th Cir. 2008).

Here, the Amended Counterclaim does not allege facts demonstrating that the ownership of any copyright vested in Tabarka “as a matter of law.” Accordingly, Tabarka was required to demonstrate that a writing existed that validly transferred ownership of the copyrights in the Paris Metro 1, Paris Metro 11, and Casablanca 2 works to it. *Id.* Tabarka does not allege the existence of any such writing. Instead, Tabarka simply ignores the fact that the rights in at least Paris Metro 1, Paris Metro 11, and Casablanca 2 never belonged to Mr. Zenati. Tabarka attempts to evade the requirements of § 204 by claiming that Mr. Zenati transferred *his* rights orally, which he later memorialized in a writing. (Amended Counterclaim at ¶¶ 17-19). Again, the rights were never Mr. Zenati’s to begin with, and nothing in the Amended Counterclaim explains how or if the rights were transferred from Darna to anyone else.

iii. Tabarka's claims related to Paris Metro 1, Paris Metro 11, and Casablanca 2 should be dismissed.

Because Darna lacked the corporate capacity to create the Paris Metro 1, Paris Metro 11, and Casablanca 2 works, it could not be a valid author or owner of those Works. Because Darna lacked the corporate capacity to enter into any agreements with Tabarka (or anyone

1 else), it could not assign rights in these Works to Tabarka. Simply put, Tabarka cannot
2 demonstrate that it has standing to sue for alleged infringement of the Paris Metro 1, Paris
3 Metro 11, or Casablanca 2 works. Accordingly, all claims related to those Works should be
4 dismissed. *Silvers*, 402 F.3d at 889.

5 **C. Tabarka Has Failed to State a Claim.**

6 Tabarka has not pled enough facts to state a claim to relief for infringement of a valid
7 copyright with respect to the Paris Metro 1, Paris Metro 11, and Casablanca 2 designs that is
8 plausible on its face. *See Twombly*, 550 U.S. at 570. This conclusion is compelled by, at the
9 very least, Tabarka's failure to plead facts demonstrating a necessary chain of title.
10 Additionally, with respect to the Casablanca 2 design, Tabarka has failed to allege any facts
11 demonstrating why the Copyright Office's rejection of registration was improper.
12

13 **1. Tabarka has failed to plead facts demonstrating ownership of a valid**
14 **copyright in Paris Metro 1, Paris Metro 11, and Casablanca 2.**

15 As detailed above, Paris Metro 1, Paris Metro 11, and Casablanca 2 suffer from
16 facially-invalidating ownership issues. Under 17 U.S.C. § 201, copyrights in, at least, Paris
17 Metro 1 and Paris Metro 11 initially vested in Darna. Tabarka has not pled sufficient facts
18 demonstrating a transfer of purported rights from Darna to Tabarka. Furthermore, Tabarka
19 cannot amend the Counterclaim consistent with its previous pleadings to demonstrate a
20 transfer from (non-existent) Darna to Tabarka. *See, e.g., Schreiber Distrib. Co. v. Serv-Well*
21 *Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (“If the complaint is dismissed for failure
22 to state a claim, leave to amend should be granted unless the court determines that the
23 allegation of other facts *consistent with the challenged pleading* could not possibly cure the
24 deficiency.”) (emphasis added).

1 In contrast to the allegations in the Amended Counterclaim, the registrations for the
 2 Paris Metro 1 and Paris Metro 11 purport to vest authorship in Darna as an “employer for
 3 hire.” (Exhibits A1 and A2).³ If a work is made for hire, the employer for whom the work
 4 was prepared is deemed the initial owner of the copyright. *See* 17 U.S.C. §§ 201(a),
 5 201(b). Moreover, “the 1976 Copyright Act contains many intricate formalities that an author
 6 (or his or her heirs) must navigate to successfully terminate the grant to the copyright in an
 7 original work of authorship, but perhaps none is more fundamental an impediment than the
 8 one excluding from the reach of termination the copyright ‘in a work made for hire.’” *Siegel*,
 9 658 F. Supp. 2d at 1041 (citing Melville B. Nimmer, Nimmer on Copyright § 5.03[A] at 5–12
 10 (2008) (commenting that the exclusion “relating to termination of transfers is probably the
 11 most important feature of the work for hire doctrine with respect to works created at
 12 present”); 3 William F. Patry, Patry on Copyright § 7:42 (2008) (labeling as a “significant
 13 exclusion” to the right to terminate the grant in “work-for-hire creations”).

16 Here, Tabarka purports to rely on the “presumptive validity” of the registrations for the
 17 Paris Metro 1 and Paris Metro 11 works. However, such presumption—unless rebutted—only
 18 devolves to the benefit of Darna, Inc. *Id.* Darna, Inc. is not the Counterclaimant. Tabarka is
 19 the Counterclaimant. However, Tabarka has not alleged sufficient facts to show that it has
 20 come anywhere close to compliance with the “intricate formalities” necessary for Darna to

22 ³ Separate and apart from this Court’s consideration of the attached Exhibits in deciding the
 23 Rule 12(b)(1) Motion, the Court may also judicially notice matters pursuant to Federal Rule of
 24 Evidence 201 in deciding the Rule 12(b)(6) Motion. *See Mir v. Little Co. of Mary Hosp.*, 844
 25 F.2d 646, 649 (9th Cir. 1988). The court may take judicial notice of facts “not subject to
 reasonable dispute” because they are either: “(1) generally known within the territorial
 jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to
 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201; *see also Lee v.*
City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001) (noting that the court may take judicial
 notice of undisputed “matters of public record”).

1 transfer its ownership of the subject works. *Id.* Nor can Tabarka baldly allege ownership of
2 such works, when such allegations are clearly contradicted by the Copyright Office
3 registrations. *See Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010)
4 (explaining “allegations that contradict...matters properly subject to judicial notice” are not
5 required to be accepted as true, and taking into consideration two documents properly treated
6 as “part of the complaint”).
7

8 Simply put, the discrepancies in Tabarka’s allegations and in its registered copyrights,
9 absent any explanation by Tabarka in the counterclaims, are fatal to Tabarka’s claims at this
10 stage.
11

2. Merola has failed to state a claim with respect to Casablanca 2.

12 Tabarka admits that Casablanca 2 is not registered. Therefore, to properly state a claim
13 for infringement, Tabarka was required to plead, at the very least, facts demonstrating why the
14 rejection by the Copyright Office was improper. Here, however, Tabarka has not even
15 alleged facts demonstrating the basis for the rejection of the Casablanca 2 registration; and
16 Tabarka certainly does not allege facts demonstrating that the rejection of the Casablanca 2
17 registration was improper. *See, e.g., Aqua Creations USA Inc. v. Hilton Hotels Corp.*, No. 10
18 CIV. 246 PGG, 2011 WL 1239793, at *3 (S.D.N.Y. Mar. 28, 2011), aff’d sub nom., *Aqua*
19 *Creations USA Inc. v. Hilton Worldwide, Inc.*, 487 Fed. App’x 627 (2d Cir. 2012) (explaining
20 district court’s role in evaluating a copyright rejected by the Copyright Office, and dismissing
21 copyright infringement claim “because [claimant] has not pled facts demonstrating” that its
22 design could overcome issues identified by the Copyright Office regarding the design’s
23 utility). Because Tabarka has not pled the requisite facts with respect to Casablanca 2, it has
24
25
26

1 failed to state a claim for infringement. Therefore, claims related to Casablanca 2 should be
2 dismissed.

3 **III. CONCLUSION**

4 For all of the foregoing reasons, Merola respectfully requests that the Court dismiss
5 Tabarka's infringement claims with respect to the Paris Metro 1, Paris Metro 11, and
6 Casablanca 2 works. Merola further gives notice of its intent to seek attorneys' fees as the
7 prevailing party.

9
10 Date: May 15, 2018

Respectfully submitted,

11
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33 *Attorneys for Plaintiff/Counterdefendant*
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 15, 2018, I electronically transmitted the attached document
3 to the Clerk of the Court using the CM/ECF system, and which will be sent electronically to all
4 registered participants as identified on the Notice of Electronic Filing, and paper copies will be
sent to those indicated as non-registered participants.

5 By:/s/ *Erin D. Knese* _____

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